

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 DONNA MACOMBER, HAROLD W.  
3 MACOMBER, HELEN GREEN and LARRY  
4 HOROWITZ

Case No. 06-2-0022

**ORDER FINDING COMPLIANCE**

5 Petitioners,

6  
7 v.

8 CITY OF BELLINGHAM,

9  
10 Respondent

11 This matter comes before the Board following the submittal of the City of Bellingham's (City)  
12 Compliance Report. The Compliance Report describes that the City adopted Ordinance  
13 2007-05-037 on May 7, 2007 to correct an inconsistency between the Existing Level of  
14 Service (ELOS) standard in the City's Capital Facilities Plan and the ELOS standard in the  
15 Park Plan.  
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17 **I. SYNOPSIS OF DECISION**

18 The Board finds that the City has achieved compliance by adopting an ELOS standard that  
19 is consistent through all elements of the City's Comprehensive Plan.  
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21 **II. PERTINENT PROCEDURAL HISTORY**

22 The Petition for Review was filed August 7, 2006 and captioned WWGMHB case  
23 06-2-0022. The matter came before the Board at a Hearing on the Merits of the Petition on  
24 December 14, 2006. On January 31, 2007, this Board issued its Final Decision and Order  
25 (FDO) and held that the Bellingham Comprehensive Plan was an internally consistent  
26 document except for a discrepancy between the ELOS standards recited in the Parks,  
27 Recreation and Open Space Plan (Park Plan) and the ELOS utilized in the Capital Facilities  
28 Element. The Board remanded the Plan to the City for compliance with RCW 36.70A.070.  
29 On June 11, 2007, the City filed its Compliance Report.  
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1 On August 2, 2007, the Board held a compliance hearing in Bellingham, Washington. Mr.  
2 Alan Marriner represented the City. Ms. Donna Macomber represented the Petitioners. All  
3 three Board members attended, Ms. Gadbow attending telephonically. James McNamara  
4 presided.

5  
6 At the compliance hearing, Petitioners were given the opportunity to provide the Board,  
7 within five business days, with a citation to the record to support their calculation of the  
8 alleged \$54 million shortfall in parks funding. The Board emphasized that it was not  
9 allowing further briefing or argument, but instead that Petitioners were merely to provide a  
10 reference for the source of this figure, relied upon in Petitioners' brief. Petitioners provided  
11 its information in an e-mail. Respondent has filed an objection to the scope of that  
12 response, arguing that it is nonresponsive. The Board is satisfied that Petitioners have  
13 provided references to the portions of the record they have relied upon in arriving at this  
14 figure. The remainder of the e-mail exceeded the Board's request and will not be  
15 considered.  
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### 18 **III. BURDEN OF PROOF**

19 After a board has entered a finding of non-compliance, the local jurisdiction is given a period  
20 of time to adopt a legislative enactment to achieve compliance. RCW 36.70A.300(3)(b).  
21 After the period for compliance has expired, the board is required to hold a hearing to  
22 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and  
23 (2). For purposes of board review of the comprehensive plans and development regulations  
24 adopted by local governments in response to a non-compliance finding, the presumption of  
25 validity applies and the burden is on the challenger to establish that the new adoption is  
26 clearly erroneous. RCW 36.70A.320(1),(2) and (3). Only if a finding of invalidity has been  
27 entered is the burden on the local jurisdiction to demonstrate that the ordinance or  
28 resolution it has enacted in response to the finding of invalidity no longer substantially  
29 interferes with the goals of the GMA. RCW 36.70A.320(4). The Board did not find make a  
30 finding of invalidity in its January 31, 2007 FDO, therefore the burden of proof remains with  
31  
32 Petitioners.

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2 In order to find the City's action clearly erroneous, the Board must be "left with the firm and  
3 definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121  
4 Wn.2d 179, 201, 849 P.2d 646 (1993).

5 Within the framework of state goals and requirements, the boards must grant deference to  
6 local governments in how they plan for growth:

7  
8 In recognition of the broad range of discretion that may be exercised by counties and  
9 cities in how they plan for growth, consistent with the requirements and goals of this  
10 chapter, the legislature intends for the boards to grant deference to the counties and  
11 cities in how they plan for growth, consistent with the requirements and goals of this  
12 chapter. Local comprehensive plans and development regulations require counties  
13 and cities to balance priorities and options for action in full consideration of local  
14 circumstances. The legislature finds that while this chapter requires local planning to  
15 take place within a framework of state goals and requirements, the ultimate burden  
16 and responsibility for planning, harmonizing the planning goals of this chapter, and  
17 implementing a county's or city's future rests with that community.  
18 RCW 36.70A.3201 (in part).

19 In sum, the burden is on the Petitioners to overcome the presumption of validity and  
20 demonstrate that any action taken by the City is clearly erroneous in light of the goals and  
21 requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).

22 Where not clearly erroneous and thus within the framework of state goals and requirements,  
23 the planning choices of the local government must be granted deference.

#### 24 **IV. ISSUE PRESENTED**

25 Has the City cured the internal inconsistency in its Comprehensive Plan, as identified in the  
26 Board's January 31, 2007 Final Decision and Order?

#### 27 **V. DISCUSSION**

##### 28 **Positions of the Parties**

29 Following remand, the City submits that it has cured the internal consistency between the  
30 ELOS standard in the Capital Facilities Element and the Park Plan through the adoption of  
31 Ordinance 2007-05-037. Noting that the Board found that the internal inconsistency was  
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1 likely due to the City's failure to properly update population data at the time of the 2004 Park  
2 Plan update, the City updated all ELOS ratios using 2002 population data.<sup>1</sup> The City now  
3 uses an ELOS standard of 47.5 acres/1,000 throughout the Plan. The City argues that it  
4 has cured the only area of non-compliance identified by the Board.

5  
6 Petitioners do not dispute that the City has now adopted a uniform ELOS standard of 47.5  
7 acres/1,000.<sup>2</sup> However, they argue that the amended comprehensive plan fails to provide a  
8 mechanism to finance the capital facilities costs required to maintain the 47.5 acres/1,000  
9 ELOS standard within projected funding capacities.<sup>3</sup> Petitioners allege that the financial  
10 analysis performed by the City assumed the City was adopting the Proposed Level of  
11 Service (PLOS), not the 47.5 acres/1,000 ELOS. This, they claim, creates an internal  
12 inconsistency between what the City has adopted as its level of service and what it can  
13 afford.  
14

## 15 16 **Board Discussion**

17 The Board's January 31, 2007 FDO remanded the City's Capital Facilities Plan and Park  
18 Plan to the City for compliance with RCW 36.70A.070 to cure inconsistencies in the adopted  
19 ELOS standards. On remand, the City took a number of steps to comply with RCW  
20 36.70A.070, specifically:  
21

- 22 • On March 2, 2007, the City published notice in the Bellingham Herald of an  
23 April 2, 2007 public hearing to consider amendments to the Capital Facilities  
24 Chapter and Park Plan to address the internal inconsistency issues.<sup>4</sup>  
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- 26 • On April 2, 2007 the City held a public hearing on the proposed changes to the  
27 Park ELOS standard and did a first and second reading on Ordinance 2007  
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31 <sup>1</sup> Declaration of Leslie Bryson, at 2.

32 <sup>2</sup> Petitioner's (*sic*) Reply to City of Bellingham's Compliance Report, at 2.

<sup>3</sup> Id. at 3.

<sup>4</sup> Declaration of Leslie Bryson, at 2.

05-037.<sup>5</sup> A third reading was held on May 7, 2007 and the ordinance became effective on May 22, 2007.

- Ordinance 2007-05-037 adopted the same ELOS standards in the Capital Facilities Chapter and Park Plan, 47.5 acres/1,000.

The City presented the details of this adoption process to the Board in its Compliance Report. The Compliance Report and attached Ordinance 2007-05-037 demonstrate that the City chose to cure the inconsistency between the 42.15 acres /1,000 ELOS found in the Capital Facilities Element and the 47.5 acres/1,000 ELOS found in the Park Plan by making the necessary amendments to establish a uniform ELOS of 47.5 acres/1,000 throughout the Plan.

Petitioners' principal objection to the City's compliance strategy is that it asserts that that City should have retained the 42 acre ELOS found in the Capital Facilities Element. By adopting a uniform ELOS of 47.5 acres/1,000 the City has adopted a LOS that it has neither analyzed nor can afford, Petitioners claim.

However, it is apparent from the record that the City's financial analysis was based on the 47.5 acres/1,000 ELOS. Chapter 5 of the Park Plan entitled "Land and facility demand" contains the fiscal analysis of the impact of using an ELOS of 47.5 acres/1,000. Page 115 of the Park Plan<sup>6</sup> presents cost data for facility cost assuming the adoption of the 47.5 acres/1,000 ELOS. Use of that ELOS resulted in an assumed per capita cost of \$4,501.46<sup>7</sup> and it was upon that figure that the City based its 6-year and 2003-2022 financial strategies for funding parks capital facilities.<sup>8</sup>

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<sup>5</sup> Ibid.

<sup>6</sup> Record at 2750.

<sup>7</sup> Record at 2751.

<sup>8</sup> Record at 2761 and 2762.  
ORDER FINDING COMPLIANCE  
Case No. 06-2-0022  
August 28, 2007  
Page 5 of 8

1 This financing plan was adopted by the City in December 2006 by Ordinance 2006-12-125<sup>9</sup>  
2 and was not appealed. Since the City used the same figure for the ELOS in the financing  
3 plan originally that it has now adopted throughout the comprehensive plan, there is no basis  
4 for re-opening the financing plan for review. A review of the Park Plan also refutes  
5 Petitioners' argument that the City's financial analysis was based on adopting the PLOS  
6 instead of ELOS. Section 5.3 of the Park Plan, "Future growth implications"<sup>10</sup> calculates a  
7 per capita cost of maintaining ELOS as \$4,501. This figure is based on the City's use of  
8 ELOS as the level of service standard, as can be seen in the record 2750-2751, where an  
9 ELOS of 47.49 is the basis for the "Total impact for land and facilities –per capita" of  
10 \$4,501.46. This is consistent with the City's position, with which this Board agreed in our  
11 FDO, that the City adopted ELOS, not PLOS as its parks level of service standard.  
12  
13

14 **Conclusion:** The Petitioners have not carried their burden of proof to demonstrate that the  
15 City's Comprehensive Plan continues to contain internal inconsistencies. Instead, the City  
16 has cured the internal inconsistency between differing ELOS standards identified by the  
17 Board, and in so doing has not created any additional inconsistencies.  
18

## 19 20 VI. FINDINGS OF FACT

- 21 1. The City of Bellingham is a city in Whatcom County, which is located west of the  
22 crest of the Cascade Mountains, and is required to plan under the terms of RCW  
23 36.70A.040.  
24 2. On June 5, 2006, the City adopted Ordinance 2005-06-05, adopting a new  
25 Comprehensive Plan that included Land Use, Capital Facilities, and Park, Recreation  
26 and Open Space elements.  
27 3. Petitioner filed a Petition for Review of this ordinance with the Board on August 7,  
28 2006. The petition challenged the internal consistency of the parks Level of Service  
29 standards.  
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32 <sup>9</sup> The Board agreed to take judicial notice of this Ordinance at the August 2, 2007 hearing.

<sup>10</sup> Record at 2748 et seq.  
ORDER FINDING COMPLIANCE  
Case No. 06-2-0022  
August 28, 2007  
Page 6 of 8

1 4. On January 31, 2007 this Board found that the City's adoption of Ordinance 2005-  
2 06-05 failed to comply with RCW 36.70A.070 in that the ELOS standard in the City's  
3 Capital Facilities Element was inconsistent with the ELOS standards in the Parks  
4 Plan.

5 5. In response, the City adopted Ordinance 2007-05-037 which adopted an ELOS of  
6 47.5 acres/1,000 in both the Capital Facilities Element and the Park Plan.

7 6. The City's financial analysis of the ELOS its 2006 Comprehensive Plan  
8 Amendment was predicated upon an ELOS of 47.5 acres/1,000.  
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## 10 **VI. CONCLUSIONS OF LAW**

11  
12 A. The Board has jurisdiction over the parties and subject matter of this petition for  
13 review.

14 B. The City has adopted a uniform ELOS standard for parks of 47.5 acres/1,000  
15 which complies with the internal consistency requirements, found in RCW  
16 36.70A.070.  
17

## 18 **VII. ORDER**

19  
20 The City's adoption of Ordinance 2007-05-037, following remand, complies with RCW  
21 36.70A.070 and with the January 31, 2007 remand from this Board. Accordingly this case is  
22 CLOSED.  
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24 Entered this 28th day of August 2007.  
25

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27 \_\_\_\_\_  
James McNamara, Board Member

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29 \_\_\_\_\_  
Margery Hite, Board Member

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31 \_\_\_\_\_  
Holly Gadbaw, Board Member  
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1 Pursuant to RCW 36.70A.300 this is a final order of the Board.

2 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date  
3 of mailing of this Order to file a petition for reconsideration. The original and three  
4 copies of a motion for reconsideration, together with any argument in support  
5 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the  
6 original and three copies of the motion for reconsideration directly to the Board, with  
7 a copy to all other parties of record. **Filing means actual receipt of the document at**  
8 **the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing  
9 of a motion for reconsideration is not a prerequisite for filing a petition for judicial  
review.

10 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
11 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
12 judicial review may be instituted by filing a petition in superior court according to the  
13 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil  
14 Enforcement. The petition for judicial review of this Order shall be filed with the  
15 appropriate court and served on the Board, the Office of the Attorney General, and all  
16 parties within thirty days after service of the final order, as provided in RCW  
17 34.05.542. Service on the Board may be accomplished in person or by mail, but  
18 service on the Board means **actual receipt of the document at the Board office** within  
thirty days after service of the final order. A petition for judicial review may not be  
served on the Board by fax or by electronic mail.

19 **Service.** This Order was served on you the day it was deposited in the United States  
20 mail. RCW 34.05.010(19)